85-448

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD PAUL KWIATECKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

Was Petitioner properly convicted of receiving stolen property under 18 U.S.C. §2315, where the only evidence of criminal intent is Petitioner's failure to make four payments and the use of a false credit reference?

II.

Did Petitioner violate 18 U.S.C. §2315, prohibiting receipt of stolen property moving as or which are a part of interstate commerce, where the word processing equipment allegedly stolen was transported from Pennsylvania to Maryland by the seller of the equipment, was installed at its intended final destination in Maryland by seller's agent, and where Petitioner never gained control and dominion over the equipment until after the installation?

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IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1985

Edward Paul Kwiatecki
Petitioner

-vs-

United States of America
Respondent

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions below were unreported. The oral opinion of United States District Judge James R. Miller, Jr. is reproduced in the Appendix as Appendix A. The unreported opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix as Appendix B.

JURISDICTION

This Petition seeks review of the judgment of the United States Court of Appeals dated and entered July 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2314 provides:

> "Whoever with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited...
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C. §2315 provides:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares or merchandise, or securities, of the value of $500 or more, moving as, or

> which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;...
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

STATEMENT OF THE CASE

Petitioner placed an order to purchase two word processing units with Exxon Office Systems ("Exxon"). The order was placed in the name of Promenade Associates. Petitioner arranged for a bank official to give Promenade Associates a favorable but false credit reference in order to cause the equipment to be delivered.

Records of Exxon indicate that the order was received on September 8, 1982 and the equipment ordered by Promenade Associates approved on September 10, 1982. The application form was then forwarded to the Exxon's home office in Floral Park,

New Jersey. According to the shipping records maintained by Exxon, the equipment ordered by Promenade Associates was shipped on September 14, 1982 from Lionsville, Pennsylvania to the customer, Promenade Associates, at 11300 Rockville Pike, Suite 1001, in Rockville, Maryland. The type of shipment was direct to the customer via courier. Exxon's first attempt to deliver the ordered equipment to Promenade through Airborne Courier failed when no one was at the Promenade offices as scheduled. The computers were finally delivered on September 24, 1982 to Promenade Associates and a receipt obtained from Pia McKay, an employee at 11300 Rockville Pike, Suite 1001, Rockville, Maryland. The delivery was made by Exxon's regular delivery service, Technitrux, and was accompanied by the Exxon's technician, J.R. Koyner, who

hooked up the equipment at that location. Suite 1001, 11300 Rockville Pike was leased by Petitioner during the time in question. Monthly payments due for the purchase of the equipment were not made.

On January 26, 1983, the equipment was recovered by an FBI agent acting pursuant to a valid search warrant at the same location to which it was delivered. There was no evidence Petitioner attempted to move or dispose of the equipment after its installation on September 4, 1982. On September 1, 1983, Petitioner was charged in a two count indictment with violation of 18 U.S.C. §2314 and 18 U.S.C. §2315. Count Two of the indictment charged the Petitioner as follows:

> "From on or about September 24, 1982 to on or about January 26, 1983, in the State and District of Maryland,

EDWARD PAUL KWIATECKI

and

JACK STANLEY LLOYD

did knowingly and willfully receive, conceal, and store goods, wares and merchandise, to wit: computerized word processing equipment, having a value of $21,878.50 more or less, moving as, or which are a part of or which constitute interstate commerce from the State of Pennsylvania to the State of Maryland, knowing the same to have been stolen, unlawfully converted, and unlawfully taken."

Petitioner waived his right to a jury trial and proceeded to a judge trial upon a stipulation of evidence. On October 28, 1983, the Petitioner was found guilty of Count Two, violation of 18 U.S.C. §2315. Appendix A. On December 20, 1983, the Petitioner was sentenced to 4 years plus ordered to make restitution of $6,000, the amount due the victim. On July 15, 1985, the Court of Appeals for Fourth Circuit affirmed.

ARGUMENT

I.

PETITIONER WAS IMPROPERLY CONVICTED OF RECEIVING STOLEN PROPERTY UNDER 18 U.S.C. §2315, WHERE THE ONLY EVIDENCE OF CRIMINAL INTENT IS PETITIONER'S FAILURE TO MAKE FOUR PAYMENTS AND THE USE OF A FALSE CREDIT REFERENCE.

The interpretation placed upon 28 U.S.C. §2315 by the Fourth Circuit Court of Appeals would transform debtor/creditor relationship into criminal activity. The question here is, however, whether the record proves beyond a reasonable doubt that Petitioner is guilty of anything other than being a debtor who bought Exxon machines in September and did not make 4 months payments, when the machine was picked up for Exxon the following January. While this behavior was criminal in old Dickens

stories about debtors' prison, it is not criminal today. Note that in sharp contrast to United States v. McClintic, 470 P.2d 685 (8 Cir. 1978) cited by the Fourth Circuit Court of Appeals, this record is totally devoid of any facts setting forth how Petitioner intended to dispose of the property received or otherwise profit from its receipt. The equipment was recovered the same place it was installed by Exxon four months earlier. There is no evidence of a scheme or plan to sell the merchandise received for cash and abscond with same.

Particularly illustrative of the above point is the case cited by the Fourth Circuit Court of Appeals, United States v. Grainger, 701 F.2d 308 (4th Cir. 1983). On May 14, 1980, Grainger accepted a check for $7,400 as security for payment for merchandise. The $7,400 payment was wired

to Grainger the next day. The check should then have been cancelled. On July 2, 1980, Grainger negotiated the checks. This Court sustained the jury's guilty verdict based upon evidence which included the unexplained alteration of the date of the check and abundant evidence belying Grainger's contention that he did not remember being paid the first time. That evidence included the fact Grainger was under severe financial pressures at the time he negotiated the check. Noteworthy for the purpose of this appeal is that the conviction was grounded solely on the July 2, 1980 negotiation. The receipt of the check of May 14, 1980 was not in itself criminal. Only the subsequent events and disposition of the property received provide the requisite factual basis for proving the fraudulent intent. The record in this case contains no such subsequent events and no

evidence whatsoever as to disposition or intended disposition of the property. The evidence which sustained the conviction in Grainger is simply absent here.

II.

DEFENDANT DID NOT VIOLATE 18 U.S.C. §2315, PROHIBITING RECEIPT OF STOLEN PROPERTY MOVING AS OR WHICH ARE A PART OF INTERSTATE COMMERCE, WHERE THE WORD PROCESSING EQUIPMENT ALLEGEDLY STOLEN WAS TRANSPORTED FROM PENNSYLVANIA TO MARYLAND BY THE SELLER OF THE EQUIPMENT, WAS INSTALLED AT ITS INTENDED FINAL DESTINATION IN MARYLAND BY SELLER'S AGENT, AND WHERE PETITIONER NEVER GAINED CONTROL AND DOMINION OVER THE EQUIPMENT AFTER THE INSTALLATION.

The property ended its interstate journey prior to its receipt by Petitioner.

Determining when an item is moving in interstate commerce has been thoroughly discussed by several courts. In its recent discussion of the issue in McElroy v. U.S., 455 U.S. 642 (1982), this Court relied upon several earlier case definitions.

> "(G)enerally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended the movement should finally end."
> 455 U.S. at 654, fn 17

> "(S)o long as its movement within the destination state can be considered a continuation of the movement that began out of state the prerequisite of 18 U.S.C. §2315 is satisfied" 455 U.S. at 657, fn 21

> "delays enroute do not deprive shipments of continued characterization as interstate or foreign commerce so long as the goods have not yet reached their destination."
> 455 U.S. at 657, fn 21 (emphasis supplied)

As is apparent from the above quoted exerpts, whether an item remains in interstate commerce depends upon whether it has reached its final destination, i.e., "the point where the parties originally intended the movement should finally end."

A review of the case precedent favorably cited by this Court reinforces that view.

Thus, in U.S. v. Tobin, 576 F.2d 687 (5th Cir. 1982), cert denied 439 U.S. 1051 (1978), the appellate court affirmed a conviction under 18 U.S.C. §2315, for receipt of property moving in interstate commerce. The facts indicate two statues were stolen from Illinois in 1974. In 1976 the Defendants attempted to sell same to FBI agents in Florida. The appellate court found there was "ample evidence for the jury to conclude even this long delay did not interrupt the movement of the statues in interstate commerce.... The evidence that whoever transferred the statues to Tobin (the Defendant) told Tobin that the art was stolen from Chicago suggests that everyone who had the statues between fall 1974 and July 1976 knew that they were stolen. This, in turn, permits the inference that any transfers from the original thief were

part of the whole process." 576 F.2d at 693. In short, the fact the defendants were arrested while trying to sell the merchandise belies the argument it had reached its final destination.

Similarly, in United States v. Licavoli, 604 F.2d 613, 624-625 (9th Cir. 1979), a conviction under 18 U.S.C. §2315 was affirmed. The defendant's challenge to jurisdiction due to a lack of interstate commerce was rejected because "the jury could conclude that Licavoli (the defendant) acted as a fence and that the transfer was an integral part of an essentially continuous transaction."

Again, the permisible inference the defendant is a fence necessarily implies further movement and therefore no "final destination."

In United States v. Garber, 626 F.2d 1144 (3rd Cir. 1980) jurisdiction based

upon interstate commerce required a finding "the goods have not yet reached its final destination" 626 F.2d at 1148, fn 3. The facts of the case indicated the merchandise which was unexpectedly delayed in Philadelphia, on its way to its originally intended final destination in Pittsburgh. Nonetheless, the Court found the merchandise was still in foreign commerce because "in the circumstances of this case, Cerro's (victim of theft) active pursuit of alternative purchases demonstrates Cerro's intent to resume the shipments as soon as possible. This intent is dispositive and supports the conclusion that at the time of the theft, the shipment of cooper cathodes had not yet reached its final destination and had not yet lost its foreign commerce character." 626 F.2d at 1152. Again, jurisdiction is

sustained because the evidence permits the inference of additional intended movement.

The other cases cited by this Court in McElroy employ analogous reasoning. In United States v. Maddox, 394 F.2d 297, 299-300 (4th Cir. 1968), theft of sugar in a temporary ware house awaiting further shipment to an as yet undetermined location was still in interstate commerce, since the sugar had not yet reached its intended final destination. In United States v. Hiscott, 586 F.2d 1271, 1274 (8th Cir. 1978) and United States v. Goble, 512 F.2d 458, 469 (6th Cir. 1975), the fact the defendants were acting as a fence and were arrested while attempting to sell a stolen vehicle belies the argument the stolen vehicle had reached its final destination. Accordingly, the item was still in interstate commerce.

Applying the above principal to the facts of this case, the stiuplation fails to provide sufficient nexus with interstate commerce to warrant conviction. To warrant conviction, the receipt, disposition, sale, barter, storing or concealment of the goods had to occur while the goods were in interstate commerce. That is, the requisite criminal act had to occur prior to the time the goods reached their intended final destination.

The facts do not indicate a violation of any of the acts proscribed by Section 2315, i.e., the fact that the goods moved from Pennsylvania to Bethesda in no way constitutes a receipt, concealment, storing, bartering, selling or disposition of the goods.

The Stipulation upon which Petitioner was convicted provided, in part:

"According to the shipping records maintained by Exxon Office Systems, the equipment ordered by Promenade Associates was shipped on September 14, 1982 from Lionsville, Pennsylania to the customer, Promenade Associates, at 11300 Rockville Pike, Suite 1001 in Rockville, The type of shipment was direct to the customer via courier. Mitchell said Exxon's first attempt to deliver the ordered equipment to Promenade through Airborne Courier failed when no one was at the Promenade offices as scheduled. This failure to deliver the equipment resulted in a series of telephone calls from a Mr. Taylor of Promenade Associates complaining about the mix-up in the delivery dates. The computers were finally delivered on September 24, 1982 to Promenade Associates and a receipt obtained from Pia McKay, an employee at 11300 Rockville Pike, Suite 1001, Rockville, Maryland. The delivery was made by Exxon's regular delivery service, Technitrux, and was accompanied by the Exxon Office Systems technician, J.R. Koyner who hooked up the equipment at that location. The delivery and installation of the equipment is reflected in government exhibit number two, Exxon Office Systems Installation Certificate for Agreement Number 386204."

Unlike the cases discussed in McElroy, this case contains no evidence

whatsoever whereby it can be inferred the Petitioner intended that the equipment would be further moved. There was no evidence Petitioner was a "fence". There was no evidence Petitioner contacted any individual to arrange for the further movement of the property. The equipment was recovered on January 26, 1983 (four months after its delivery and installation) at the same location at which it was delivered and installed. This complete lack of movement coupled with a complete lack of evidence of any intent or act to lead to further movement permit only one inference, the equipment had reached its final destination. The facts presented in McElroy and the cases cited therein permitting a contrary inference are simply not present here.

There is also nothing in the Stipulation which indicates that the Petitioner

ever received or had any power or dominion over the property prior to the end of its interstate journey. There is no indication Petitioner was present at the time the property was received or delivered. In fact, the inference is to the contrary inasmuch as there is installation receipt slips signed by a Pia McKay, "an employee at 11300 Rockville Pike." There is no evidence to link Pia McKay to the Petitioner.

In any event, the evidence linking Petitioner to the apartment where the Exxon Equipment was delivered is insufficient to link him to the property prior to the time it ended its interstate commerce journey.

Further, the Fourth Circuit Court of Appeals failed to recognize the difference between 18 U.S.C. §2314 and 18 U.S.C. §2315. Petitioner was found guilty under

Count Two of the superceding indictment of a violation of 18 U.S.C. Section 2315. That section proscribes in relevant part the receipt, concealment or disposition of "any goods... of the value of $5000 or more... which are part of or which constitute interstate or foreign commerce, knowing same to have been stolen unlawfully, converted or taken... (emphasis supplied). The first count of the superceding indictment charged a violation of 18 U.S.C. §2314, but was dismissed. Section 2314 of the Code prohibits the transportation "in interstate commerce of any stolen property knowing the same to have been stolen." The distinction between Section 2314 and 2315 is self evident. Section 2314 proscribes transportation of stolen property in interstate commerce. The criminal act is the transport. Thus the crime itself

is complete if the potential defendant actually causes the property in question to be transported. However, Section 2315 prohibits the receipt, concealment, disposition of the property rather than the transportation of the property. Therefore, the criminal act is receipt, concealment or disposition. To sustain a conviction the property must be in interstate commerce at the time the criminal act occurs.

In McElroy v. U.S., 455 U.S. 642 (1982) the case involved a violation of Section 2314. The defendant was found guilty because he caused a check to be stolen and transported across state lines. Defendant later attempted to use the check with a forged signature to obtain a boat and a motor vehicle. The Court held that it was irrelevant if the check was forged before or after it crossed state lines.

At some point in its continuous journey (which was in interstate commerce) the check was transported in its forged condition. Thus, the elements of Section 2314 were satisfied; that is, a criminal act (transportation) during interstate commerce.

However, in this case, the charge is under Section 2315, not 2314. The crime is not transportation but receipt. Since there is no criminal act (receipt) during interstate journey, no violation of Section 2315 occurred. The facts of McElroy relating to Section 2314 are inapposite.

This matter is important because it constitutes an unwarranted expansion of Federal criminal jurisdiction. The facts

in this case are clear. Petitioner received stolen goods as found by the court. The stolen goods were received in Maryland, the transaction to procure them occurred in Maryland, and the property was intended to be used in Maryland. Petitioner was not involved with the shipping arrangements, which were irrelevant to him and completed prior to his receipt of the property. A holding that in such a situation there is federal jurisdiction by reason of interstate commerce is tantamount to holding all receipt of stolen property is within the federal statute in this day and age when virtually everything is shipped from state to state.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to the United

States Court of Appeals for the Fourth Circuit.

Respectfully submitted:

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PETITIONER'S APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	Criminal No: M-83-00273
	*	
v.	*	(Interstate Transportation of Stolen Property, 18 U.S.C. Section 2314; Receipt of Stolen Property, 18 U.S.C. Section 2315; Aiding and Abetting, 18 U.S.C. Section 2)
EDWARD PAUL KWIATECKI	*	
and	*	
JACK STANLEY LLOYD	*	

* *

ORAL OPINION OF
DISTRICT COURT JUDGE JAMES R. MILLER, JR.

Delivered in Open Court

October 28, 1983

The Court: All right. The Court has considered the evidence that was set forth in the Stipulation, which will be filed and which has been signed by Mr. Deady and Mr. Kwiatecki and Mr. Zuckerman and is dated October 27th.

The Court has also considered the Exhibits which have been marked Government's Exhibits 1 and 2.

The Court has considered the objections which were raised by Mr. Zukerman, that is, on page 8, the last sentence of paragraph 8. That objection is sustained.

Page 10, the second full sentence at the top of the page concerning the testimony of Mr. Berlin, the Court denies, overrules, that objection, beliving that the evidence was not intended to be confidential, but

was in fact an instruction to make something public; and also on page 10, as to the statements made by Lloyd to Richards, the objection is overruled, finding, as the Court does, that Mr. Lloyd was a co-conspirator and an aider and abetter charged in the indictment as to Count Two of the superseding indictment, and that the statements were made as a part of the conspiracy and pursuant thereto, to attempt to cover up what had been done.

So, one objection is sustained, as I stated, and two objections are overruled.

The Court, based upon the evidence, concludes beyond a reasonable doubt that the Defendant is guilty of the offense charged in Count Two in that he did, on or about September 24th, 1982 until January, 1983, knowingly and willfully receive, conceal, and store goods, wares

and merchandise, that is, computerized word processing equipment, having a value of approximately $21,878.50, moving as, or which was a part of, or which constituted interstate commerce from the State of Pennsylvania to the State of Maryland, knowing the same to have been stolen, unlawfully converted, and unlawfully taken.

Here are the exhibits to the stipulation. Those two exhibits are in evidence.

(Unpublished) APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5011

United States of America,

Appellee,

versus

Edward Paul Kwiatecki,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge. (CR M-83-00273)

Argued June 7, 1985. Decided July 15, 1985

Before HALL and PHILLIPS, Circuit Judges, Eugene A. GORDON, United States District Judge, sitting by designation.

Sheldon H. Braiterman for Appellant; Elizabeth H. Trimble (J. Frederick Motz, United States Attorney; Michael Schatzow, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

Edward Paul Kwiatecki appeals from a conviction after a bench trial for receiving stolen goods under 18 U.S.C. §2315. He principally challenges the sufficiency of the evidence to convict him of the offense charged. We affirm.

I.

Kwiatecki ordered computer equipment from Exxon Office Systems (Exxon) allegedly knowing that he would not pay for it. With the aid of a bank official Kwiatecki submitted false financial information to Exxon that induced Exxon to ship the equipment from its distribution office in Pennsylvania to an apartment in Maryland. Exxon installed the equipment in the apartment which was rented at the time by Kwiatecki. Kwiatecki failed to pay for the equipment, and the FBI eventually recovered it during a search of the apartment.

II.

Kwiatecki contends that insufficient evidence exists to support a finding that the equipment was stolen, that he cannot be convicted of receiving stolen goods when he is also the alleged thief of the goods, and that the evidence does not support a finding that the equipment retained an interstate commerce character at the time he took possession of it. We find no merit in any of these contentions.

The evidence produced at trial supports the trial court's finding that the equipment was stolen. Congress intended section 2315 to include goods stolen by false pretenses or fraud as well as by outright taking. United States v. McClintic, 570 F.2d 685, 689 (8th Cir. 1978). The evidence in the record that Kwiatecki obtained false credit reports in order to induce Exxon to ship the equipment would

allow the trial judge to conclude beyond a reasonable doubt that the equipment was stolen in the requisite sense. See United States v. Grainger, 701 F.2d 308, 311 (4th Cir. 1983).

In United States v. Bauer, 713 F.2d 71, 75 (4th Cir. 1983), we held that although a defendant may not be convicted for both theft and receipt of stolen goods on the basis of a connected transaction involving both, a conviction on either charge in that situation is permissible. Although Bauer was convicted under a different statute, we find the principle to be fully applicable in this case.

Section 2315 requires that the stolen goods be moving as, be part of, or constitute interstate commerce at the time of receipt in order to convict under that section. Property retains its interstate

commerce character for the purposes of section 2315 from the time that it enters the channels of interstate commerce until it comes to rest at its final destination. McElroy v. United States, 455 U.S. 642, 653-54 n.17 (1982). The issue of whether the stolen property had the requisite interstate commerce character is a question of fact. See United States v. Licavoli, 604 F.2d 613, 624-25 (9th Cir. 1979).

The computer equipment entered the channels of interstate commerce when Exxon shipped it from its Pennsylvania distribution office and did not come to rest until at least after Exxon installed the equipment in Kwiatecki's Maryland apartment.* We find that the evidence in the record would allow the trial court to find beyond a reasonable doubt that Kwiatecki took constructive possession of the equipment

as it was being moved into and installed in the apartment. Hence the property retained its interstate commerce character at the time Kwiatecki received it.

Finding no error in the proceedings below, we affirm.

AFFIRMED.

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*Although we do not reach the question, the government contends that the property retained its interstate commerce character beyond the time of its installation in the apartment because Kwiatecki intended to move the goods further after engaging in related transactions. See Licavoli, 604 F.2d at 624-25.